



DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 4

RIN 2900-AN60

Schedule for Rating Disabilities; Evaluation of Amyotrophic Lateral Sclerosis

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) is amending its Schedule for Rating Disabilities by revising the disability evaluation criterion provided for amyotrophic lateral sclerosis (ALS) to provide an evaluation of 100 percent for any veteran with service-connected ALS. This change is necessary to adequately compensate veterans who suffer from this progressive, untreatable, and fatal disease. This change is intended to provide a total disability rating for any veteran with service-connected ALS.

DATES: Effective Date: This final rule is effective [Insert date 30 days after date of publication in the FEDERAL REGISTER].

Applicability Date: This final rule applies to an application for benefits that:

- Is received by VA on or after [Insert 30 days after date of publication in the FEDERAL REGISTER];

- Was received by VA before [Insert 30 days after date of publication in the FEDERAL REGISTER] but has not been decided by a VA regional office as of that date;
- Is appealed to the Board of Veterans' Appeals on or after [Insert 30 days after date of publication in the FEDERAL REGISTER];
- Was appealed to the Board before [Insert 30 days after date of publication in the FEDERAL REGISTER] but has not been decided by the Board as of that date; or
- Is pending before VA on or after [Insert 30 days after date of publication in the FEDERAL REGISTER] because the Court of Appeals for Veterans Claims vacated a Board decision on the application and remanded it for readjudication.

FOR FURTHER INFORMATION CONTACT: Nancy A. Copeland, Consultant, Regulations Staff (211D), Compensation and Pension Service, Veterans Benefits Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 461-9428. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: On June 23, 2010, VA published in the Federal Register (75 FR 35711) a proposed rule that would revise the evaluation criterion for amyotrophic lateral sclerosis (ALS) in the VA Schedule for Rating Disabilities (diagnostic code 8017 in 38 CFR 4.124a, the schedule of ratings for neurological conditions and convulsive disorders). The schedule previously

provided a minimum evaluation of 30 percent for ALS; however, we determined that providing a 100-percent evaluation in all cases would obviate the need to reassess and reevaluate veterans with ALS repeatedly over a short period of time, as the condition worsens and inevitably and relentlessly progresses to total disability, and we proposed to increase the minimum evaluation for ALS to 100 percent.

Comments in Response to Proposed Rule

A 30-day comment period ended July 23, 2010, and we received comments from 17 individual members of the general public and 1 from the Amyotrophic Lateral Sclerosis Association. The comments from the general public included 5 from veterans who have ALS, 3 from family members of veterans who have ALS or who died from ALS, and 1 from an individual raising claim-specific issues. Fifteen of the individual commenters expressed support for the rule. Two of the 15 said they support the rule “wholeheartedly,” and others used expressions such as “it is imperative” and “it is absolutely vital.” We are not making any changes to the final rule based on these supportive comments.

In addition, the Amyotrophic Lateral Sclerosis (ALS) Association strongly endorsed the proposed rule. It stated that the establishment of an evaluation of 100 percent for ALS in all cases, plus the note under the evaluation criterion that recommends consideration of special monthly compensation (SMC) (an additional monthly amount of compensation that may be paid to veterans with certain serious disabilities) will help ensure that veterans with ALS are compensated appropriately. The ALS Association recommended that VA adopt special

processing procedures to expedite ALS claims; however, VA has already established procedures for handling hardship cases involving seriously disabled veterans. Therefore, we are not making any changes to the final rule based on this comment.

One commenter said that he would like to see the 100-percent rating for this disease given to all veterans, whether or not they are service-connected. However, under current law, 38 U.S.C. 1110 and 1131, VA's authority is limited to providing compensation to veterans with service-connected disabilities. Therefore, as VA is prohibited from taking the action the commenter requests, we are not making any changes to the final rule based on this comment.

One commenter expressed the belief that revision of the VA rating schedule in the proposed rulemaking would be "arbitrary," arguing that ALS was being evaluated differently from other neurological disorders. The comment expressed the belief that the proposed rule would "rate multiple disabilities as a single disability" when a possibility of entitlement to SMC exists, and that the proposed rule would "produce decisions which result in payment at a rate lower than the veteran is entitled to now."

VA appreciates this comment; however, this rule does not change the procedure for evaluating service-connected disabilities. It only prescribes a higher minimum disability rating for ALS. VA remains required to provide an evaluation for all service-connected disabilities, regardless of whether a veteran already has received a 100-percent disability rating for one. Therefore, all veterans will

continue to receive thorough evaluations for all service-connected disabilities and disorders. All veterans who would be eligible for SMC or ancillary benefits before the promulgation of this regulation will remain so.

As the proposed rule explained, ALS is a rapidly progressing disease, and establishment of a 100-percent evaluation for ALS will not adversely affect how ALS is evaluated for rating purposes. Although a veteran may receive compensation at the 100-percent rate based either on a 100-percent evaluation specifically for ALS or on a combined evaluation for ALS and other service-connected conditions, on either basis VA may consider the veteran for varying levels of SMC, which is an amount of compensation in addition to amounts payable for service-connected disability, including disabilities rated 100-percent disabling, where applicable. Indeed, as amended, 38 CFR 4.124a includes a note to the rater: "Consider the need for special monthly compensation." Furthermore, because this rule does not alter VA's procedures regarding evaluation of all disabilities and disorders, any ancillary benefits to which a veteran may be entitled will be preserved. We thus make no changes to the regulation based on this comment.

One general public commenter raised claim-specific issues that are unrelated to this rulemaking. We thus are making no changes to the proposed rule based on this comment.

Therefore, based on the rationale set forth in the proposed rule and this document, we are adopting the provisions of the proposed rule as a final rule with no changes.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This rule will have no such effect on State, local, and tribal governments, or on the private sector.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” which requires review by the Office of Management and Budget (OMB), as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a

material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order."

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Paperwork Reduction Act

This document contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601-612. The rule could affect only VA beneficiaries and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rule is exempt from the initial and final regulatory flexibility

analyses requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance program numbers and titles for this rule are as follows: 64.109, Veterans Compensation for Service-Connected Disability; and 64.110, Veterans Dependency and Indemnity Compensation for Service-Connected Death.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on October 7, 2011, for publication.

List of Subjects in 38 CFR Part 4

Disability benefits, Pensions, Veterans.

Dated: December 15, 2011

Robert C. McFetridge,
Director of Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons set out in the preamble, 38 CFR part 4, subpart B, is amended as set forth below:

Part 4--SCHEDULE FOR RATING DISABILITIES

1. The authority citation for part 4 continues to read as follows:

AUTHORITY: 38 U.S.C. 1155, unless otherwise noted.

Subpart B—Disability Ratings

2. In § 4.124a, revise diagnostic code 8017 to read as follows:

§ 4.124a Schedule of ratings—neurological conditions and convulsive disorders.

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8017 Amyotrophic lateral sclerosis.....	100

NOTE: Consider the need for special monthly compensation.

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[FR Doc. 2011-32531 Filed 12/19/2011 at 8:45 am; Publication Date: 12/20/2011]